LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 28 1962
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 35

EDWARD YELLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF ON REARGUMENT

RABINOWITZ & BOUDIN
30 East 42nd Street
New York 17, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Counsel for Petitioner

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel

INDEX

SUBJECT INDEX

	Page
Petitioner's Reply Brief on Reargument	1
Point I—The Activities of the Committee Constitute Unlawful Abridgement of the Constitutional Rights of the Petitioner	3
Point II—On Balance, Petitioner's Right to Refrain From Disclosing His Political Views and Associations Should Be Protected in the Circumstances of This Case	7
Point III—The Statute Under Which Petitioner Was Convicted Was Unconstitutionally Vague	15
Point IV—Petitioner Was Entitled to Be Heard at Executive Session	16
Conclusion	18

Table of Authorities Cited

CASES

A. B. Small Co. v. *American Sugar Refining Co.*, 267 U.S. 233 15
Adamson v. *California*, 332 U.S. 46 6
American Communications Association v. *Douds*, 339 U.S. 382 ..... 9, 13
Barenblatt v. *United States*, 360 U.S. 109 ..... 1, 2, 3, 4, 5, 6, 7, 9, 12, 15, 16
Bates v. *City of Little Rock*, 361 U.S. 516 3
Braden v. *United States*, 365 U.S. 431 ..... 1, 6, 15
Bridges v. *California*, 314 U.S. 252 6
Carlson v. *Landon*, 342 U.S. 524 13
Child Labor Tax Case, 259 U.S. 20 4
Communist Party v. *S.A.C.B.*, 367 U.S. 1 6
De Jonge v. *Oregon*, 299 U.S. 353 ..... 4, 6
Dennis v. *United States*, 341 U.S. 494 13

Page

Hannegan v. *Esquire*, 327 U.S. 146 6
Jones v. *Opelika*, 316 U.S. 584 6
National Association for the Advancement of Colored People v. *Alabama*, 357 U.S. 449 3
Olmstead v. *United States*, 277 U.S. 438 12
Scull v. *Virginia*, 359 U.S. 344 3
Shelton v. *Tucker*, 364 U.S. 479 3
Standard Chemicals Corp. v. *Waugh Chemicals Corp.*, 231 N.Y. 51 15
Stromberg v. *California*, 283 U.S. 359 6
Sweezy v. *New Hampshire*, 354 U.S. 234 3
United States v. *C.I.O.*, 335 U.S. 106 6
United States v. *Cohen Grocery Co.*, 255 U.S. 81 15
United States v. *Flynn*, 216 F. 2d 354 8
United States v. *Rumely*, 345 U.S. 41 ..... 4, 15
Watkins v. *United States*, 354 U.S. 178 ..... 3, 6
Webster v. *Fall*, 266 U.S. 507 16
West Virginia Board of Education v. *Barnette*, 319 U.S. 624 6
Whitney v. *California*, 274 U.S. 357 6
Wilkinson v. *United States*, 365 U.S. 399 ..... 1, 6, 15, 16
Yellin v. *United States*, 287 F. 2d 292 13

CONSTITUTION

First Amendment 3, 4, 9, 10, 13
Fifth Amendment 5, 15

STATUTES

2 U.S.C. §192 15
Subversive Activities Control Act of 1950, 64 Stat. 987 13

CONGRESSIONAL MATERIAL

Charter, House Committee on Un-American Activities 4
Hearings, House Un-American Activities Committee, 82nd Cong. 8
Hearings, House Un-American Activities Committee, 83rd Cong. 8

Page

Hearings, House Un-American Activities Committee, 84th Cong. 8
Hearings, House Un-American Activities Committee, 85th Cong. 8
Standing Rules of the House of Representatives, Rule XI 15

MISCELLANEOUS

Douglas, "The Submerged American", Frontier Magazine, Aug. 1962, p. 2 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 35

EDWARD YELLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF ON REARGUMENT[1]

The Government has withdrawn the brief previously submitted in this case and, on reargument, has filed a new and much more extensive brief. The new brief is evidently prompted by the feeling that despite this Court's decisions in *Barenblatt v. United States*, 360 U.S. 109, *Wilkinson* v. *United States*, 365 U.S. 399, and *Braden v. United States*, 365 U.S. 431, "the present controversy involves the most delicate and dangerous of the Court's responsibilities" (Gov't Brief, p. 26) and hence a re-examination of the principles adopted by the Court in the cases cited is appropriate. We concur in and indeed welcome this conclusion; we too think that this controversy involves constitutional issues of such magnitude that the Court may never rest in its

[1] This brief replaces the reply brief on the merits filed by the petitioner.

examination of them even in the face of "prior decisions made by [this Court] after full argument and deliberation" (Gov't Brief, p. 25). The rule of *stare decisis* can never be permitted to supersede the commands of the Constitution.

We differ however as to the nature of this constitutional issue, and so does this Court. The Government sees it as the power of the Court to "review the manner in which the Congress . . . has performed one of its own congressional functions" (Gov't Brief, p. 26). In the opening sentence of the Court's opinion in the *Barenblatt* case (at p. 111), the issue was described as "the conflicting constitutional claims of congressional powers and of an individual's right to resist its exercise". We think the Court was correct. The principal problem is not one of the relationship between the Court and the Congress, but rather the relationship between our Government—in this case, the Congress—and its citizens, and the extent to which the former may control the political activities of the latter. The House Committee on Un-American Activities (hereinafter referred to as the Committee) has for twenty-five years been engaged in an inquiry into the political beliefs and associations of large numbers of Americans with the avowed purpose of destroying an unpopular political movement by exposing its adherents in a context which does not permit of a free debate and the open exchange of ideas. This Court cannot prevent the Committee from exercising this power, unconstitutional though it may be, except when a justiciable controversy is presented to it. When the Committee resorts to compulsory process to call witnesses before it and when a witness resists that process, thus bringing on to himself a criminal indictment, such a justiciable controversy is presented. This is the case now before the Court.

This issue no more involves "the dangers of collision" (Gov't Brief, p. 26) between Court and Congress than does any other case presenting the issue of the constitutionality of congressional action.

POINT I

The Activities of the Committee Constitute Unlawful Abridgement of the Constitutional Rights of the Petitioner.

We do not quarrel with the Government's contention (Brief, pp. 26-35) that congressional investigating committees are lawful. We will even assume, *arguendo*, that all of the Cold War cases cited by the Government at pages 36 to 45 of its brief were correctly decided, though we note strong (and to our minds persuasive) dissenting opinions in every one of them.

The specific issue raised by this case, however, is not whether Congress may impose, in general, some restrictions on Communists. It is agreed by all that "the provisions of the First Amendment . . . reach and limit congressional investigations" (*Barenblatt, supra*, p. 126). The process by which such investigations may erode and even destroy democratic discussion of political issues is described in *Watkins* v. *United States*, 354 U.S. 178 at 197. For analogous situations, see *Sweezy* v. *New Hampshire*, 354 U.S. 234; *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449; *Scull* v. *Virginia*, 359 U.S. 344; *Bates* v. *City of Little Rock*, 361 U.S. 516; *Shelton* v. *Tucker*, 364 U.S. 479. The issue here is the extent of the limitation which, we all agree, the First Amendment imposes on congressional investigations.

It can hardly be denied at this late date that the Committee does interfere with the free exercise of speech and assembly and with the correlative right to remain silent

concerning one's political views. The literature on the subject is so extensive, the public discussion so widespread and the judicial analysis so exhaustive that this Court would be blind if it did not recognize what "all others can see and understand". *United States* v. *Rumely*, 345 U.S. 41, 44; *Child Labor Tax Case*, 259 U.S. 20, 37. For over two decades this Committee has been a major repressive force against the exercise of activities supposed to be protected by the First Amendment. It preceded and survived the era of Senator McCarthy. As much as any other institution in our country it has stifled "the dialogue that has characterized the free society," so that even in these days, "no debate takes place on crucial issues". Douglas, "The Submerged American", Frontier Magazine, Aug. 1962, p. 2. Yet we know that "the security of the Republic, the very foundation of constitutional government" lies in the preservation of free speech, press and assembly so that the opportunity for free political discussion may be maintained. *De Jonge* v. *Oregon*, 299 U.S. 353, 365.

The Government, as in the other cases involving this Committee, has sought to avoid discussion of the effect of the Committee's activities by close and literal attention to the limited facts in the case at bar. Thus this case is treated as if the Committee were engaged in a single investigation into "colonization" of the steel industry and as if the petitioner were an isolated instance of a recalcitrant witness. Even if this were so we would argue that the Committee had exceeded its power and that even the single recalcitrant witness is entitled to the protection of the Constitution. But this is not so. This investigation is but one of hundreds which the Committee has conducted under the vague provisions of its charter, which gave it jurisdiction over "Un-American propaganda activities" and under the even more vague and general jurisdiction granted to the Committee by this Court in the *Barenblatt* case. This

petitioner is but one of thousands of witnesses whom the Committee has called. He is not an isolated unwilling witness; the overwhelming majority (about 85%) of the witnesses called by the Committee has refused to answer questions. His case is not the exception—it is the rule. He is here only because, by refraining from use of the protection provided by the Fifth Amendment, he (like Watkins, Barenblatt, Braden, Wilkinson and about thirty others) chose to challenge the Committee directly.

Viewed against this background, the enormity of the Committee's offense against the American people becomes clear. This is not only the case of a single individual who is held up to public scorn because he holds unpopular views. Such an individual is entitled to protection against government interference, but it is true, as the Government suggests, that persons who espouse unpopular views may expect some unpopularity as a result. This is rather the case of a society which is denied the right to hear the expression of dissenting views, which is denied the opportunity for free political discussion. Our democratic society, together with the Yellins, the Bradens and the Wilkinsons, is a co-petitioner in these cases.

The Government responds to all of this by, in effect, a plea of confession and avoidance. We are told that all of this, even if true, is required by our national security and that we resolve the issue in each case through "a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown". *Barenblatt, supra,* at p. 126. We do not fully understand the balancing doctrine; as we point out in our original brief (at pp. 16-18) we do not know who balances what and how the result is determined. With the greatest deference to this Court, we doubt whether anyone understands it. But, at least in this point in our argument, our quarrel is not

with the application of the balancing doctrine. We think it wrong in principle.

It is wrong in principle for the reasons set forth in the dissenting opinion in *Barenblatt*. It is contrary to the clear mandate of the Constitution. Moreover it proceeds on the false premise that our national security requires the suppression of some rights of speech, assembly and association. There is nothing in our history (or in any other history) which teaches that the suppression of the free expression of thought, however heretical, contributes to the preservation of a democratic society. The contrary is true; if we can boast of any great contribution to political theory it is the doctrine of *Whitney* v. *California*, 274 U.S. 357, concurring opinion 376; of *Stromberg* v. *California*, 283 U.S. 359; of *De Jonge* v. *Oregon*, 299 U.S. 353; of *Bridges* v. *California*, 314 U.S. 252; of *Jones* v. *Opelika*, 316 U.S. 584, 319 U.S. 103; of *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624; of *Hannegan* v. *Esquire*, 327 U.S. 146; of *Adamson* v. *California*, 332 U.S. 46, dissenting opinion at p. 89; of *United States* v. *C.I.O.*, 335 U.S. 106, concurring opinion at p. 144; of *Watkins* v. *United States*, 354 U.S. 178 and the recent dissenting opinions in *Barenblatt, Braden, Wilkinson* and *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 115, 137, 169, 191.

Finally, the activities of the Committee, it seems, are sought to be justified on the ground that they are aimed only at Communists and Communist activity. The record of the Committee, of course, shows that its activities are directed not only against Communists but against Communist dupes, Communist fellow-travellers, ex-Communists, crypto-Communists, Communist sympathizers, persons subject to Communist domination, organizations which are Communist infiltrated, socialists and a host of other categories variously described in the new vocabulary developed

by the Committee. There is hardly any aspect of American life from the motion picture industry to the clergy, from the press to the trade unions, from the peace movement to the universities which has not at some time or other been honored by the issuance of Committee subpoenas. Folk-singers, teachers, lawyers, journalists, doctors, housewives have all had their chance to visit with the Committee. The scope of its activities as interpreted by this Court would permit it to investigate literally anything, if only to discover whether there exists in the subject under investigation some faint aroma of a "subversive" nature.

For almost all of recorded history groups of heretics have been singled out as beyond the pale of the rights enjoyed by the orthodox; we do not believe such application of our Bill of Rights is permissible.

POINT II

On Balance, Petitioner's Right to Refrain From Disclosing His Political Views and Associations Should Be Protected in the Circumstances of This Case.

Without in any way waiving our fundamental objections to the balancing concept, we consider now the result of its application here. In its present brief, the Government makes a serious effort to meet the challenge posed in Point I of our original brief, namely, "the task of defining and exploring the 'balancing concept'" expressed by this Court in its most explicit form in the *Barenblatt* case at p. 126 (Pet.'s Brief, p. 15). So far as we know, this is the first time the Court has had presented to it, from the Government's point of view, the problem of applying the balancing test.

A. The public interest at stake is defined (Gov't. Brief, p. 48) as "the need for information concerning putative

subversive activities in a critical area of our national life." No effort is made at this point and very little elsewhere to place in the balance the much greater public interest in the right to hear and participate in open political discussion without fear of governmental reprisal.

What weight is to be given this public interest, as defined by the Government? At the time of petitioner's hearing the Committee had been collecting information on alleged Communist infiltration in basic industry for many years (see our original brief at pp. 18-20). Does there not come a time when the public interest in collecting more information becomes *de minimis?* How many times does the Committee have to listen to the dreary recital of repetitious testimony by John Lautner[2] and a host of other professional government witnesses,[3] before it has collected enough information to convince it that legislation is or is not needed?

How many times does it have to use its compulsory process to call witnesses who, it knows in advance, will refuse to testify before it can draft the laws necessary to protect our society from the menace which seems to lurk

---

[2] Lautner testified in New York at hearings held during the 84th Congress; his testimony appears at pp. 6178, 6233 and 6338 in the Committee's printed hearings for that Congress. He testified during the 85th Congress in New York (at pp. 275, 650, 800 and 2493) and in Chicago (at p. 485) in addition to his testimony at Gary. He was, of course, an important witness in *United States* v. *Flynn*, 216 F. 2d 354, 362. Indeed, he testified in both New York Smith Act cases and in Smith Act cases in Detroit, St. Louis, Colorado, Baltimore, Hawaii, Seattle, California, New Haven, Pittsburgh and perhaps others. During the entire period of time in question he was on the government payroll.

[3] Most of the witnesses such as Philbrick (82nd Congress at p. 1257 and 83rd Congress at p. 2007) Younglove (84th Congress at p. 4834), Peoples (84th Congress at pp. 4949; 4979) also testified at Smith Act cases concerning alleged infiltration.

in every factory, mill and mine? The Government itself refers (Brief, p. 49) to the "mass of material available" as early as 1947. Indeed, this material has been before this Court on many previous occasions. See, for example, the concurring opinion of Mr. Justice Jackson in *American Communications Association* v. *Douds*, 339 U.S. 382, 422, 424. The files of the Committee since that date have been implemented by thousands of pages of testimony taken in half a dozen different cities on this very subject of Communist infiltration in basic industry. See footnote (1) at page 11 of our original brief. Is there never a time when the task is completed—or at least when more inquiries weigh very little against the right of petitioner and the right of a free society to enjoy without governmental interference the privileges granted by the First Amendment?

We argued in our original brief that the information sought by the questions put to petitioner were at best cumulative and that the Committee concededly knew the answers to the questions it asked. To this the Government responds (at p. 59):

> "... we most earnestly submit that the power of a Congressional committee to ask material questions in the course of an inquiry into a proper subject of legislative investigation cannot be made to depend upon a judicial determination of how helpful the Court would find the information."

But the issue we are discussing at this point is not the relevance of the information, or its materiality, or even the "power" of a congressional committee to ask such questions. We are discussing how heavily it weighs in the *Barenblatt* balance, "in the particular circumstances shown." In *this* connection it is certainly appropriate to consider the fact that the information was either cumulative of testimony already given to the Committee *ad nau-*

scum in other hearings (Counts 2 and 4) or corroborative of information the Committee already had in its files (Counts 1 and 3; Gov't. Brief, p. 63). We are concerned here with weight in a constitutional balance, not with the narrow and technical problem of pertinence. If the Court is not to consider weight, how can it balance?

B. So much for one side of the scale. On the other side are the personal rights of petitioner as granted by the First Amendment and the fundamental rights of a democratic society to govern itself after full discussion of political issues, free from government investigation, exposure or other forms of interference. There is little mention of the latter point in the Government's brief, though we should have thought it one of the most critical of the problems raised in this record. How can a democratic society hope to succeed in an atmosphere in which its citizens are afraid to engage in free and open discussion of political issues—an atmosphere engendered by the activities of the very Committee here under discussion?

The Government seeks to minimize petitioner's personal rights under the First Amendment by noting he was maintaining only his right to be silent and not to speak; that he was motivated by the preservation of his right of privacy, not his right of free speech (Brief, pp. 64-66). Admitting a constitutional right against undue governmental prying and conceding that it is essential to freedom of belief and, "in the beginning", essential to effective political action, the Government nevertheless comes to the conclusion (Brief, p. 64) that such a constitutional right does not have much weight.*

---

* The Government applies a double standard in determining how weight in the balance is to be determined. In weighing the public interest in collecting information, the Government deals in very broad terms—it says that so long as there is a public interest we

This is a most disingenuous argument. Aside from our disagreement as to the weight to be given the right of privacy (considered by some to be the most important of all rights),[5] there is a more important point to be made. Indeed, it was well made by the petitioner himself, when at the hearing he was taunted by the Chairman of the Investigating Committee, who said:

> "Isn't this the best place to clarify the atmosphere . . . is this not a great opportunity to eliminate whatever question might be in anybody's mind, particularly mine, about your activities?"

The witness replied:

> "Mr. Walter I do not feel that this is the place for myself, as an individual and as a citizen, to discuss my beliefs, my associations or whatever expressions of opinion I have ever made. I feel that ideas in the democratic process should be settled, should reach some kind of an understanding, in the market place of ideas and not at a congressional investigation . . . I believe the entire democratic process revolves around settling things in a free and open market and this is not the place for it. This is a hearing. It is not an expression of public opinion" (R. 173).

The right of self-expression certainly includes the right to choose for one's own self the occasion for such expres-

---

need not inquire too closely into the extent of the need. But in weighing the individual's interest and privacy "the exact nature of the constitutional issue must be taken into account in weighing the governmental against the private interest" (Brief, p. 64).

[5] ". . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emo-

sion. A witness at a hearing of this Committee may well reject such an occasion for a public debate. The record, of course, is silent on the atmosphere at the Gary hearings but no one who was there could possibly confuse it with the marketplace of ideas sought by the witness. Certainly neither the existence of nor the weight to be afforded to constitutional rights can depend on the Government's (or this Court's) judgment as to when, where and how those rights are to be exercised.

C. We conclude, on the basis of the foregoing, that the public interest in further disclosure of information weighed very little in the *Barenblatt* balance as against the very substantial public and private interest in the preservation of free speech and association, on this record. But there are issues remaining which add to the reasons for a reversal of petitioner's conviction. A reading of the *Barenblatt* formulation of the balancing test would lead to the assumption that whether X outbalances Y is a question of fact. If so, testimony should be adduced in support of the opposing factual contentions. The failure to adduce such evidence can hardly be met by any doctrine of judicial notice—clearly the weight to be given to the various elements in the scale are in sharp dispute. The Government having failed to offer any evidence in support of its contentions, petitioner's motion to dismiss at the close of the Government's case should have been granted. Petitioner himself did his best in offering the testimony of Professor Emerson, but the testimony was rejected.

The Government avoids this problem with the statement (Brief, p. 76) that "the issue whether a witness' rights

---

tions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. . . ." Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478.

under the First Amendment has been violated by a congressional committee is . . . a question of law." This position is not responsive to the question. The issue whether X outbalances Y can hardly be called a question of law.*

It is in this connection that we offered the testimony of Professor Emerson. The Government argues at page 76 of its brief that his testimony "gave no new legal or factual considerations which were not considered by this Court in Barenblatt." It may be true as the Government points out at that place that Professor Emerson's testimony was contrary to the conclusions relied upon by the Court in *American Communications Association* v. *Douds*, 339 U.S. 382; *Dennis* v. *United States*, 341 U.S. 494; and *Carlson* v. *Landon*, 342 U.S. 524. It may also be true that his testimony was contrary to the findings of Congress as set forth in the Subversive Activities Control Act of 1950, 64 Stat. 987. However, it is our understanding that the purpose of a trial is to determine disputed issues of fact. Indeed, Professor Emerson's testimony is admissible precisely because it challenges the facts which this Court accepted in other cases, especially because in none of those cases, as far as we know, was evidence presented to support the findings of fact on which the Court relied. In those cases, this Court took judicial notice of certain facts, based on purported congressional findings and on the general knowledge of the Justices of this Court. Certainly, it lies in the power of a defendant in a criminal case to prove that the

---

* We note that the Court of Appeals did hold that "It is not a question of fact as to what elements go to make up the balance of interests, public and private, but a legal matter . . . ." Court of Appeals decision, 287 F. 2d 292 at 298. The question, however, is not what elements go to make up the balance of interests—of that there is probably not much dispute—but rather what weight is to be ascribed to these elements. See our discussion at p. 18 of our original brief.

factual assumptions upon which the Court and Congress proceeded are in fact incorrect.

D. Despite the foregoing, we must confess that we find ourselves attempting to weigh the imponderable and to measure the limitless. The task of balancing or even comparing rights and interests such as those discussed above is for the metaphysician, not the lawyer. How much weight in a balance can be given to the public interest involved in the tenth hearing into Communist infiltration into basic industry? How much weight do we give to the individual's right to remain silent when questioned concerning his political beliefs by a congressional committee in a courtroom full of hostile angry faces? These questions are reminiscent of the futile debates of medieval scholastics. They do not seem appropriate for the determination of rights on which so much of our liberty depends.

And yet, we can see no way of avoiding such disputes if this Court is to continue to apply the balancing test. Indeed, the questions raised above are not the whole of the problem—many others will arise in other cases. There will be questions of burden of proof, issues of the admissibility of evidence (only suggested by the issue raised here with respect to the Emerson testimony) and endless dispute in areas having nothing to do with "subversive" activity but relating instead to the struggle by the Negro people in the South for equal rights. (See cases cited in our original brief at pp. 16 and 22.)

This Court does not avoid issues because they are difficult but it ought not to adopt the rule by which the constitutional rights will depend on standards impossible to apply with some degree of objectivity and exactness.

POINT III

The Statute Under Which Petitioner Was Convicted Was Unconstitutionally Vague.

The Government argues that Rule XI of the Rules of the House is not a criminal statute and hence that "the rules for construing criminal statutes do not apply to the construction of Rule XI" (Gov't. Brief, p. 78).

The short answer to this contention is found in *United States* v. *Rumely*, 345 U.S. 41. In that case a conviction under Section 192 of Title 2 was upset on the strength of the Court's interpretation of the resolution creating the committee. That case holds that Sec. 192 makes it a crime for a witness to refuse to give testimony to a Congressional committee upon any matter under inquiry *which is within the jurisdiction of said committee*. The statute so read is vague and uncertain.

This Court has held it improper to require "the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233. To the same effect see *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. Indeed, this rule has been applied not only to criminal cases but even to civil cases where the standard is much less rigorous. *Standard Chemicals Corp.* v. *Wayne Chemical Corp.*, 231 N.Y. 51.

It is true that convictions have been had under 192 in *Barenblatt*, *Braden* and *Wilkinson*. But for the reasons set forth above at page 1 and suggested by the Government at page 26 of its brief, the issue ought not to be allowed to rest on that fact alone. As in the case of Point I above, constitutional rights are at stake, this time under the due process clause of the Fifth Amendment. It is never

too late to reexamine such constitutional issues, especially when, as here, the matter was not discussed by the Court in any of the decisions upon which the Government relies and does not even seem to have been raised in *Barenblatt* and *Wilkinson*.

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents". *Webster* v. *Fall*, 266 U.S. 507, 511.

This is a classic case of a vague and hence unenforceable statute. We regret the failure of the Government to discuss this issue on its merits. While this Court sought to give meaning to the law by reference to its history in the *Barenblatt* decision, we know of no case, prior to *Barenblatt*, in which a court relied on legislative history in order to uphold a criminal conviction. The Government does not cite any such case and we suspect that there is none. We think such procedure improper. See our original brief, p. 31.

POINT IV

Petitioner Was Entitled to Be Heard at Executive Session.

In Point II of petitioner's brief, we argued that the Committee violated its own rules in failing to consider petitioner's request for an executive session. For the most part, we think that the issue is sufficiently drawn so as to make it unnecessary to reply except for one slight respect in which we think the Government has mistaken the record. At page 38 of its brief, the Government notes that Congressman Walter testified that the Committee had passed on the question of whether or not it would hear petitioner

in executive session. As often happens, petitioner and the Government have each quoted a different portion of a witness' answer, with the result that the context in which the answer is given becomes clouded. So that the Court may more clearly see this context, we quote at some length:

"Q. . . . Wasn't it possible for the Committee to hear Mr. Yellin in executive session at that time? A. Well, the Committee already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable because the investigator—and I might say it was Mr. Collins, a former F.B.I. agent, who developed this entire matter, and we were willing to accept his story with respect to the proposed testimony.

Q. And what was his story? A. Well, his story was that the man was a known Communist; that he had been active in the international conspiracy, and that he had deceived his employer; and, furthermore, he came within the category of those people that we were experiencing a great deal of difficulty in finding out about with respect to the colonization.

Q. Did you assume, from Mr. Collins' report, that Mr. Yellin would be a witness who would refuse to give information to the Committee? A. We had no way of knowing.

Q. Well, what conclusions did you draw from the report of Mr. Collins, which you have just related? A. We concluded that this would be a fine witness for the Committee in support of proposed legislation having to do with colonization, and, two, having to do with the protection of our defense efforts. And it is always worth a chance that somebody will testify.

Q. But it wasn't worth the chance of calling him in

executive session, to see what his position would have been? A. I am sure that had you communicated this whole matter to the Committee before we left Washington so that we could have given it due consideration—we would have, and always do—we might have a different situation today" (R. 70).

Congressman Walter here makes it perfectly clear that the Committee, in deciding not to hold an executive session, was violating its own rules. The rules provide that an executive session is to be granted when "the interrogation of a witness in a public hearing might . . . unjustly injure his reputation." The Committee applied a completely different test as the testimony quoted shows.

Conclusion

The conviction of petitioner should be reversed and the indictment dismissed.

Respectfully submitted,

RABINOWITZ & BOUDIN
30 East 42nd Street
New York 17, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Attorneys for Petitioner.

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel

November, 1962.